United States Court of Appeals

for the Second Circuit

PETITIONER'S BRIEF

No. 76-4050

United States Court of Appeals

FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

AMERICAN MAP COMPANY, INC.,

Respondent.

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P/S

ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD

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STATEMENT OF THE ISSUES PRESENTED

1. Whether substantial evidence on the record as a whole supports the Board's finding that the Company violated Section 8(a)(1) of the Act by threatening employees with discharge if they supported the Union.

2. Whether substantial evidence on the record as a whole supports the Board's finding that the Company violated Section 8(a)(3) and (1)

of the Act by terminating employee Michael Scibelli because of his union activity.

3. Whether substantial evidence on the record as a whole supports the Board's finding that the Company violated Section 8(a)(3) and (1) of the Act by refusing to reinstate unfair labor practice strikers upon their unconditional requests to return to work.

4. Whether the Board properly issued a bargaining order as a remedy for the Company's unfair labor practices.

STATEMENT OF THE CASE

This case is before the Court upon the application of the National Labor Relations Board pursuant to Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., 151, *et seq.*) for enforcement of its order (A. 55-62)[1] issued against the American Map Company, Inc. (herein "the Company") on August 18, 1975. The Board's Decision and Order are reported at 219 NLRB No. 186. This Court has jurisdiction over the proceedings, the unfair labor practices having occurred in New York, New York.

I. THE BOARD'S FINDINGS OF FACT

Briefly, the Board found that the Company, in an effort to defeat the organizational efforts of the Union,[2] violated Section 8(a)(1) of the

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[1] "A." references are to pages of the printed appendix. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

[2] Local 923, Retail Wholesale and Department Store Union, AFL-CIO.

Act by repeatedly threatening employees with discharge for supporting the Union. The Board further found that the Company violated Section 8(a)(3) and (1) of the Act by discriminatorily discharging employee Scibelli for his union activities, and by refusing to reinstate employees who engaged in a strike to protest the Company's unfair labor practices. The relevant facts upon which these findings are based are as follows:

A. The Union's organizing campaign

The Company is a New York corporation engaged in the manufacture, sale and distribution of maps at its office and plant located in Manhattan (A. 5-6; 72, 85). Michael Scibelli was employed by the Company in the shipping department (A. 12; 189). In April 1974, Scibelli and other employees began to discuss the possibility of joining a union. Following these discussions, Scibelli contacted Local 585, Retail Wholesale and Department Store Union, AFL-CIO (A. 12; 190). On April 26, Scibelli spoke to Sidney Grund, an organizer for Local 585, at the Local's office, about the possibility of organizing the Company's plant. Grund agreed to meet with Scibelli and other employees at a later date (A. 12; 190-191).

On May 1, employees Scibelli, Vance Davis and Tommy Smith, and Shipping Department Foreman Michael Glevina met with Grund and another union officer in a coffee shop in the same building in which the Company's business is located. The matter of organizing the Company's plant was discussed and the employees present decided to solicit the support of their co-workers (A. 12-13; 191-192).

B. Company officials threaten employees with discharge

On May 1 and 2, 1974, Scibelli gave out Local 585 authorization cards to employees Ronald Coleman and Carlos Bergin (A. 13; 192). These activities came to the attention of Company officials (A. 13; 285). On May 3, Mounting Department Foreman LeRoy Brown addressed a gathering of the employees of his department, including Roberto Martinez, Radmaes Martinez, Toney Joseph and Tommy Smith. Brown told those present that they should not get involved with a union because a union had tried to organizing the Company's employees previously and all the employees who were involved with the union on that occasion had been fired.[3] Brown went on to say that he had managed to continue his employment with the Company, as he had not supported the union. Brown then asked if any of the employees present were involved with the Union; none of them responded (A. 13; 196-197).

In May 1974, Company Comptroller Joseph Scali stated to employee Nicholas Ambrose that the employees were trying to form a union and warned that Ambrose should not get involved because it could result in Ambrose losing his job (A. 14-15; 286). A short time later, Company Vice-President Robert Weeks also spoke to Ambrose telling him not to get involved with certain employees who were starting a union or Ambrose might lose his job (A. 16-17; 287-288). Ambrose understood that the employees

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[3] There had been an attempt in 1962 to organize the Company's employees into a union, and an election was held in a unit of mounting, shipping, and receiving clerks. The union, Office Employees International Union, failed to win the election (A. 13-14; 141).

to whom Weeks referred included Scibelli, an active union advocate (A. 17; 287-288).

On May 6, clerical employee Barbara La Farr spoke to Scibelli in the shipping department and suggested that Scibelli stay away from the "trouble makers" who were involved with the union (A. 17; 197-198). When Scibelli asked LaFarr who the troublemakers were, LaFarr mentioned Vance Davis (A. 17; 198). Scibelli then told LaFarr that she should not blame Davis and others because he, Scibelli, was the one who originally contacted the Union (A. 17-18; 198). LaFarr told Scibelli that she was going to tell Comptroller Scali about this. Scibelli told LaFarr that she could tell anyone she pleased. Later that day, LaFarr informed Comptroller Scali that Scibelli told her that he, Scibelli, had contacted the Union (A. 18; 281, 335).

C. The Company refuses to recognize the Union

About May 6, action was taken to merge Local 585 with Local 923 (A. 18; 127-128, 263). As a result, Local 923 called a meeting on May 7 at its offices. Several of the Union officials met with ten Company employees: Scibelli, Smith, Roberto Martinez, Radmaes Martinez, Davis, Bergin, Coleman, Ambrose, Warren, and Vargas. Also present was Shipping Foreman Glevina (A. 18; 194).[4]

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[4] Glevina was later found to be a supervisor in the Regional Director's Decision in the representation case proceeding (A. 18; 107-108).

It was explained to the employees that the two union locals had merged and that it was necessary that each employee sign another authorization card (A. 18;194).[5] Union representatives told the employees present that the card was an authorization for the Union to represent the employees for the purpose of collective bargaining and that the Union would seek recognition on the basis of the cards. The employees were also told by the Union representatives that the card was not binding insofar as membership dues were concerned until the Union was recognized by the Company (A. 18, 44; 212-213, 232-233). Union Representative Waites then distributed blank authorization cards for Local 923. All 10 of the employees present completed and signed them and returned them to Waites (A. 19; 124, 126, 129, 130, 131, 132, 133, 134, 135, 137, 195, 223-224, 264-265). On May 8, Local 923 filed a petition for a Board election in a unit of all shipping, receiving, packing and map mounting employees (A. 19; 93, 138). The following day, the Union sent the Company a mailgram advising that the Union represented a majority of the Company's employees and requesting that a meeting be arranged, but the Company did not recognize the Union at that time, nor has it done so since (A. 19; 139).

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[5] The card, which is also an application for membership in the Union recites, *inter alia* (A. 42; 124):

> I do hereby irrevocably designate, authorize and empower this Local Union (923) exclusively, to appear and act for me and in my behalf before any board, court, committee or any other tribunal in any matter affecting my status as an employee or as a member of this Local Union and exclusively to act as my agent to represent and bind me in the presentation, prosecution, adjustment and settlement of my grievances, complaints or disputes of any kind or character arising out of the employer-employee relationship, as fully and to all intents and purposes as I might, or could do, if personally present.

On May 9, the Company distributed a letter concerning the Union to its employees (A. 19; 198-199). Employees were asked to return this letter to Ms. Krieger, a clerical employee, as a sign of support of the Company. Scibelli returned the letter to Krieger along with a union leaflet that he was distributing (A. 19; 199). Scibelli also gave a union leaflet to Comptroller Scali and told Scali that since Scali now had a copy of the union leaflet, Scali didn't need to ask the "girls" (the clerical employees) for one. Scali replied that he had never asked for a leaflet from the girls, but that they had given it to him (A. 19; 199).

D. Company officials again threaten employees with discharge

About May 15, Foreman Brown left work with employee Stephanie Sims[6] and accompanied her to a nearby subway entrance. Sims had heard some discussion concerning the Union and asked Brown what the Union was about and what good it would do. Brown responded that the Union was supposed to bring in better benefits but he felt the existing benefits were good enough. Brown went on to say that people had been trying for a number of years to establish a union at the Company's plant but that those who had tried were fired. When Sims asked if this could be done, Brown told her it was done all the time (A. 20; 237). Brown also said that three people were going to be fired on the following Friday (May 17) and that the "guy who was starting the union", Mike Scibelli, would be one of them (A. 20; 237, 240).

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[6] Sims married name is now Green (A. 20; 235).

On May 16, Foreman Brown again addressed a meeting of mounting department employees. Brown told the employees that they should not discuss Union activities at work. He also reminded them that people who had tried to organize a union before had been fired. Employee Smith told Brown that no one had the right to tell him, Smith, what he could talk about at any time, whether at work or any other place. Brown again reminded Smith about employees previously losing their jobs but Smith remained adamant (A. 22; 246-247).

E. The Company discharges employee Scibelli and Foreman Glevina

Late in the afternoon on May 17, Comptroller Scali told Foreman Glevina that business was slow and that a shipping department employee would have to be let go (A. 22, 269). Glevina was opposed to this and pointed out that the shipping department was "doing Miller Freeman" (a group of orders) and had a busy year coming up (A. 22; 269-270). Glevina also told Scali at that time or later the same day, that the Business Control Atlases ("BCA's") were coming in (A. 22; 172, 200, 377-378). But Scali insisted that someone had to go and asked who was the last on the seniority list. Glevina responded, Scibelli. Glevina then informed Scibelli of his layoff (A. 23; 270). Scibelli asked Glevina whether he was being laid off or fired (A. 23; 200). Receiving no answer, Scibelli then went to see Scali and after first avoiding an answer, Scali told Scibelli that he was being laid off (A. 23, 201). Scibelli's services were ended that day and he has not been rehired (A. 23; 204).

On the afternoon of May 23, Glevina was summoned to President Lewis Andrews' office where he was told that Andrews "had enough" of Glevina (A. 23; 271). In response to Glevina's request for an explanation, Andrews stated that Glevina was slowing down the work and "trying to join the Union" (*ibid.*). Glevina did not deny his interest in the Union but said that work was slowed down because employee Davis had been out sick for a couple of days and Scibelli had been laid off. Glevina then left and went to Scali's office where he reported his discharge and received his paycheck (*ibid.*). While Glevina was away from his work station and was talking to President Andrews, employee Floyd Wesley deposited a stack of orders in the shipping department bin to be completed by the department (A. 23-24; 249). After the other employees finished work that day, Glevina informed them of the circumstances of his discharge (A. 24; 271).

F. The employees strike to protest the Company's unfair labor practices

On May 24, a meeting of the employees was held at the Union's office. Representing the Union were officials Grund, Waites and Union President Skler. Company employees Scibelli, Davis, Ambrose, Smith, Roberto Martinez, Coleman, Joseph and Glevina were also present (A. 24; 125, 201). At this meeting the employees discussed the discharge of Scibelli and Glevina (A. 24; 202). Glevina reported to those present that Andrews had told him his discharge was for union activities (A. 24; 203). The employees expressed the opinion that the Company was apparently discharging the employees responsible for the Union and that such conduct might continue (A. 24; 203). Foreman Brown's warnings concerning

prior discharges for union activities was also mentioned (A. 24; 206). Grund advised the employees that he did not want to tell them what to do about the problem but that they should do what was best. The employees discussed going out on strike. Union President Skler thereupon told them what the Union would try to do for them and informed them that the Union would try to get them better benefits (A. 24; 430). A vote was taken and the employees present voted unanimously to go on strike (A. 25; 125, 204).

The strike began on Tuesday, May 28, and was accompanied by picketing which continued for 4 days, May 28 through May 31 (A. 25; 227).[7] The pickets included Smith, Vargas, Ambrose, Scibelli, Davis, Roberto and Radmaes Martinez, Warren, Coleman, Bergin, Joseph and Glevina (A. 25; 253). The employees patrolled at the front entrance and the delivery entrance of the Company's place of business carrying signs which stated: "PLEASE DO NOT PATRONIZE AMERICAN MAP CO., INC. 1926 B'WAY. NON-UNION. REFUSES TO BARGAIN. RWSDU, 130 W. 42 ST. CH 4-0847" (A. 25; 156-182).

On May 30, a payday which occurred during the week of the strike, Union representative Grund went to the Company's offices on the strikers' behalf to obtain their paychecks. Andrews sent Scali to get the checks (A. 26; 425-426). While Scali was gone, Grund asked Andrews if he would agree to sign a contract with the Union. Andrews refused (A. 26; 338, 349).

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[7] Monday, May 27 was observed as the Memorial Day Holiday (A. 25; 231).

G. The Company refuses to reinstate the strikers

About May 31, Warren and Ambrose, both of whom had been on strike, asked Scali about regaining their jobs. Warren was immediately reinstated (A. 26; 186). When Ambrose spoke to Scali, Scali declined to reinstate Ambrose, saying that his old job had been filled (A. 26; 291, 328-329). Scali also asked Ambrose what jobs he could do in the shipping department to which Ambrose responded that he could write up United Parcel deliveries and make trips to the post office (A. 26; 329). Shortly thereafter, Ambrose made an unconditional request for reinstatement to Company President Andrews. Andrews told Ambrose he was sorry he could not give Ambrose his job back because it was being performed by someone else.[8] (A. 26-27; 291). Andrews also told Ambrose that if he would stop picketing it would help Ambrose get his job back (A. 27; 292). Andrews added that he was not going to give in to the Union and would not let it win; he pointed out to Ambrose that the work was still going on even though the employees were on strike (A. 27; 316-317).

On May 31, the striking employees met and decided to call off the strike. The group, including all strikers except Warren, went to Andrews office on June 4, and through their spokesman, Tommy Smith, made an unconditional request for reinstatement (A. 27; 204-205). Andrews told them that their jobs were filled but that they would be called

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[8] At the time Ambrose's work was being performed by strike replacements Quildon and Reiche along with other shipping department work which they were handling (A. 27; 364).

(A. 27; 205). The employees then left the premises. Most of the strikers were reinstated between July and October (A. 28; 187). However, employees Scibelli, Smith, Vargas, and Davis have not been reinstated (A. 28; 187, 204).

II. THE BOARD'S CONCLUSIONS AND ORDER

On the foregoing facts, the Board concluded that the Company violated Section 8(a)(1) of the Act by threatening employees with discharge for supporting the Union. The Board also found that the Company violated Section 8(a)(3) and (1) of the Act by terminating Scibelli because of his Union activity and by refusing to reinstate the unfair labor practice strikers upon their unconditional requests to return to work.

The Board's order requires the Company to cease and desist from the unfair labor practices found and from in any other manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed in Section 7 of the Act. Affirmatively, on the basis of the evidence that the Union had obtained authorization cards from a majority of the employees, and in light of the Company's extensive unfair labor practices, the Board ordered the Company to bargain upon request with the Union for an appropriate unit of its employees and to embody any understanding reached in a signed agreement. The Board also ordered the Union to provide reinstatement with backpay to employees Scibelli, Smith, Davis and Vargas, to make whole employees Ambrose, Bergin, Coleman, Roberto Martinez, Radmaes Martinez, and

Joseph for any loss of earnings each may have suffered by the Company's initial refusal to reinstate them. The Board's order also requires the Company to post appropriate notices.

ARGUMENT

I. SUBSTANTIAL EVIDENCE ON THE RECORD AS A WHOLE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(1) OF THE ACT BY THREATENING EMPLOYEES WITH DISCHARGE IF THEY SUPPORTED THE UNION

As shown in the Statement, *supra*, the Company responded to its employees' union activities by engaging in conduct calculated to intimidate them and defeat their efforts at organization. Thus, on or about May 3, after the Company became aware of the union campaign, Foreman Brown warned mounting department employees that they should not get involved with a union because all the employees who did so during an earlier union organizing campaign were discharged by the Company.[9] Brown repeated this warning to the employees on May 16. Comptroller Scali and Vice-President Weeks warned employee Ambrose in two separate conversations that he might lose his job if he got involved with a union or with employees starting a union. And Foreman Brown informed employee Green that those who sought to establish a

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[9] Before the Board, the Company denied that Brown was acting as its agent while engaging in this and other unlawful conduct. However, in answer to the Board's complaint, the Company admitted that Brown was a statutory supervisor (A. 73, 85-86). This is sufficient to hold the Company liable for his acts. See *Irving Air Chute Co. v. N.L.R.B.*, 350 F.2d 176, 179 (C.A. 2, 1965).

union at the Company's plant were invariably fired.[10] There can be no doubt that these threats of discharge for engaging in union activity were properly found by the Board to be violative of Section 8(a)(1) of the Act. *N.L.R.B.* v. *Rubin*, 424 F.2d 748, 750 (C.A. 2, 1970); *N.L.R.B.* v. *Gladding Keystone Corp.*, 435 F.2d 129, 130 (C.A. 2, 1970); *N.L.R.B.* v. *John Langenbacher Co.*, 398 F.2d 459, 461-463 (C.A. 2, 1968), cert. denied, 393 U.S. 1049.

II. SUBSTANTIAL EVIDENCE ON THE RECORD AS A WHOLE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(3) AND (1) OF THE ACT BY TERMINATING EMPLOYEE MICHAEL SCIBELLI BECAUSE OF HIS UNION ACTIVITY.

The record amply supports the Board's conclusion that Scibelli was terminated by the Company because of his union activity. Initially, there is abundant evidence reflecting the Company's hostility to the unionization of its employees. Thus, the company not only illegally threatened employees with discharge for support of the Union, but also informed them that it had in the past carried out such threats. The Company's resort to unlawful measures in an effort to impose its own desires on the employees, is of course, significant in weighing its motives for Scibelli's termination. And the Company clearly knew that Scibelli was the principal union campaigner in the plant. Thus, Comptroller Scali was told by employee LaFarr that Scibelli had informed her of his leading role in the union movement. Scibelli also gave union literature to Scali.

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[10] The Company contends that Brown's statement to Green could not violate Section 8(a)(1) since Green was not part of the bargaining unit. However, Green was an employee and the statements made to her tended to discourage union membership and therefore violated Section 8(a)(1). *Bausch & Lomb, Incorporated*, 159 NLRB 234, 235 (1966).

Finally, the motive for the layoff is clear from the virtual admission that Scibelli's union activities was the major factor in the decision to get rid of him. Thus, the layoff was specifically referred to by Foreman Brown two days before it occurred when he told employee Green that Scibelli, the "guy who was starting the union," would be fired the following Friday (A. 240).

Before the Board, the Company defended its termination of Scibelli by asserting that a business slowdown necessitated curtailment of its shipping department operations and that Scibelli was only a temporary replacement and the last worker hired, making him the logical choice for layoff. The Board, however, rejected the Company's purported economic justification for its action, finding that it is not supported by the evidence. Thus, while the record does show a decrease in the dollar volume handled by the shipping department at the time of Scibelli's layoff, and Scibelli and Glevina gave testimony that business had slowed down somewhat (A. 144-151, 171, 221, 275), Glevina pointed out to Scali at the time of Scibelli's layoff that the Business Control Atlases (which the Company sends once a year to certain customers) was due to come in shortly from the publisher and that there was a busy year of work coming up for the shipping department. Scali, however, rejected the advice of Glevina, his shipping department supervisor, and insisted on Scibelli's separation. The Atlases, which had been promised for delivery throughout May, as Scali admitted, did begin to arrive during the following week. In fact, more than 15,000 of them were received by June 18 (A. 33; 176, 358, 380, 383-384). Glevina's prediction of a busy year is borne out by the testimony of Quildon, his eventual replacement, who stated that there was a backlog of orders in the shipping department when he began

work at the end of May 1974 and the backlog continued until the time of his testimony on November 21, 1974 (A. 33-34; 396, 400). Finally, for several weeks at about the time of Scibelli's discharge, certain work customarily done by the shipping department, that of putting maps in plastic bags, was assigned to the clerical force (A. 34; 376).

With regard to the Company's contention that Scibelli was only a temporary replacement, the evidence shows that when Scibelli was hired shortly before employee Davis went into the hospital, he was not told that his assignment was temporary, and in fact, he informed Scali that he planned to stay on indefinitely (A. 230). Although Davis returned to work in April, he was still unable to undertake all aspects of shipping department work, and was out sick for several days even during the week following Scibelli's separation (A. 32-33; 220). Finally, the evidence shows that seven employees constituted the normal complement of the Company's shipping department. Scibelli's discharge reduced the number of employees to six (A. 33; 171). When Davis resumed work following his illness this returned the complement to seven, but he was not able to undertake all aspects of shipping department work, particularly lifting. The complement had returned to seven at the time of the hearing in November 1974 (A. 33; Tr. 440).

In sum, considering Scibelli's role as a leading union advocate, the Company's demonstrated animus against unionization, and the admission by Foreman Brown that Scibelli was due to be discharged within a few days for his union activities, the Board had ample reason to conclude that the termination of Scibelli was violative of Section 8(a)(3) and (1) of the Act.

III. SUBSTANTIAL EVIDENCE ON THE RECORD AS A WHOLE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(3) AND (1) OF THE ACT BY REFUSING TO REINSTATE UNFAIR LABOR PRACTICE STRIKERS UPON THEIR UNCONDITIONAL REQUESTS TO RETURN TO WORK

It is well-settled that a strike in protest over employer violations of the Act is an "unfair labor practice strike" and that "striking employees do not lose their status and are entitled to reinstatement . . . even if replacements for them have been made." *Mastro Plastics Corp.* v. *N.L.R.B.*, 350 U.S. 270, 278 (1956). Moreover, it is clear that a "strike may be an unfair labor practice even though it also has economic objectives. . . Unfair labor practice strikers must be rehired on demand . . . even though there were also other causes of the strike." *N.L.R.B.* v. *Fitzgerald Mills Corp.*, 313 F.2d 260, 269 (C.A. 2, 1963), cert. denied, 375 U.S. 834, and cases cited therein. In short, "if an unfair labor practice had anything to do with causing the strike, it was an unfair labor practice strike . . . and the employer is bound to reinstate all strikers and discharge all those hired to replace them during the strike." *General Dirvers and Helpers, Local 662* v. *N.L.R.B.*, 302 F.2d 908, 911 (C.A.D.C., 1962), cert. denied, 371 U.S. 827.

As shown *supra*, pp. 9-10, when a group of the employees met with Union officials on May 24 at the Union's office a major subject of concern was Scibelli's discharge for union activities which had occurred a few days earlier. Glevina reported that he also had been discharged for his union activities. Mention was made of the repeated warning that had been made by Foreman Brown concerning prior discharges of union adherents. Brown's unlawful warnings as well as similar threatening remarks by Comptroller Scali and Vice-President Weeks gave the

employees reason to believe that the discharge of Scibelli and Glevina were part of a systematic effort by the Company to weed out union supporters from its workforce. The employees expressed the opinion that the discharges of employees responsible for the Union might continue. During this meeting Union President Skler also discussed what the Union would try to do and what benefits it hoped to obtain for the employees. Thereafter, picket signs were prepared and carried which asked the public not to patronize the Company because it was nonunion and refused to bargain with the Union. In these circumstances, the Board properly concluded that the strike was at least in part to protest the Company's unlawful termination of employee Scibelli.

Before the Board, the Company asserted, based on the picket sign language, the alleged failure of the Union or employees to communicate the purpose of the strike to the Company, and Union Business Agent Grund's attempt to obtain a contract from the Company during the strike, that the strike was merely for the purpose of pressuring the Company to recognize and bargain with the Union, and hence was solely an economic strike. The Board properly found this contention without merit. Thus, the evidence is undisputed that the employees at the May 24 meeting voted to strike in protest of the discharge of Scibelli and the fear based on the Company's repeated threats that similar unlawful discharges would follow. While the picket sign language and the employees did not communicate the strike's unfair labor practice purpose in so many words, the timing and circumstances are such that it is only reasonable to infer that the Company was well aware that Scibelli's discharge was the precipitating cause of the strike. See *N.L.R.B.* v. *Washington Aluminum* 370 U.S. 9, 14-15 (1962).

The Company admittedly refused to reinstate Ambrose on May 31 when he made an unconditional application to return to work and similarly refused to reinstate the rest of the strikers on June 4 when Tommy Smith made an unconditional request for reinstatement for himself and the rest of the strikers. The Board properly found that the Company thereby violated Section 8(a)(3) and (1) of the Act. Since the strikers were unfair labor practice strikers, they were entitled upon requesting reinstatement to immediate reinstatement to their former positions, even if this meant the displacement of any striker replacements hired during the course of the strike. See cases cited *supra* p. 17.

IV. THE BOARD PROPERLY ISSUED A BARGAINING ORDER AS A REMEDY FOR THE COMPANY'S UNFAIR LABOR PRACTICES

The legal principles relevant in this aspect of the case are those stated by the Supreme Court in *N.L.R.B.* v. *Gissel Packing Co.*, 395 U.S. 575 (1969). In *Gissel* the Supreme Court sustained the Board's remedial authority to issue a bargaining order in a case such as this one, where unfair labor practices have been committed "that interfere with the election process and tend to preclude the holding of a fair election." 395 U.S. at 594. The Court concluded that a bargaining order would be appropriate: (1) where the employer's unfair labor practices are so "pervasive" and "coercive" that it is the only effective means of remedying those unfair labor practices; or (2) where the unfair labor practices, though less substantial, are nonetheless such that, in view of their tendency to undermine the Union's majority and the likelihood of their recurrence in the future, "the Board finds that the possibility of effects of past practices and of ensuring a fair election by the use of tranditional remedies, though present, is slight, and that

employee sentiment, once expressed through cards, would, on balance, be better protected by a bargaining order." 395 U.S. at 614. Moreover, as this Court has observed, "the determination of whether unfair labor practices are of such a nature as to warrant the issuance of a bargaining order is for the Board and not the Courts." *M.P.C. Restaurant Corp.* v. *N.L.R.B.*, 481 F.2d 75, 79 (C.A. 2, 1973). Accord: *N.L.R.B.* v. *Hendel Mfg. Co.*, 483 F.2d 350 (C.A. 2, 1973); *N.L.R.B.* v. *Int'l Metal Specialties, Inc.*, 433 F.2d 870, 872 (C.A. 2, 1970), cert. denied, 402 U.S. 907. ("Appellant's attack on the use of a bargaining order must fail . . . in light of the Supreme Court's decision in *Gissel*, entrusting to the Board almost total discretion to determine when a bargaining order is appropriate").

Here the Company repeatedly issued warnings to unit employees that their allegiance to the Union might result in their discharge. Moreover, the Company did not limit its coercive activities to threats of reprisals. Within a short time after the Union's organizational drive began, the Company laid off Scibelli, a leading union advocate, and refused to reinstate all but one of the unfair labor practices strikers – in each instance because of the employee's support of the Union. These serious unfair labor practices, affecting most of the employees in the unit, plainly warranted a bargaining order. As the Board observed (A. 48):

> . . . no free and fair election can be held in a unit where the majority of the employees, at one point or another, have lost their livelihoods for periods of several weeks or months or longer because they have exercised their lawful rights to join and support a labor organization.

We submit that in the circumstances of this case, the Board's decision to issue a bargaining order is fully warranted under the *Gissel* decision.

The record shows that on May 9 the Union had been validly designated as collective bargaining representative by 10 of the 17 employees in the appropriate unit. Before the Board, the Company contended (1) that the Union had not obtained a valid card majority from the employees in the appropriate unit; (2) that the Union did not seek recognition in an appropriate unit and the Company's refusal to recognize the Union therefore did not warrant a bargaining order; and (3) that, even assuming the Union had a valid majority in an appropriate unit, a bargaining order was not justified under the guidelines established by *Gissel*. We show below that the Company's contentions lack merit and that the Board's findings are fully supported by the record evidence.

A. The Union had a valid card majority

The Company does not dispute the Board's finding that a unit of all full-time and regular part-time employees in the mounting, drafting and shipping and receiving departments is appropriate for bargaining. The Company also concedes that the Union had obtained authorization cards from a majority of the employees in the unit found to be appropriate by the Board before requesting recognition on May 9, 1974. The Company contends, however, that the cards should be rejected because (1) the participation of Glevina, later found to be a supervisor by the Regional Director, in the meeting at which the cards were signed, invalidates the cards; (2) the cards were obtained by the Union on the misrepresentation that they were not binding;

and (3) that employee Warren's card is invalid because Glevina previously solicited another card from Warren for Local 585 and that Vargas' card must be discounted because, being unable to speak English he must be deemed to be unaware of what he was signing. The Board properly rejected these contentions.

It is well-settled that the mere participation of a supervisor in union activities does not necessarily taint employee authorization cards. Only where the record reveals substantial participation on behalf of a union by supervisors which would lead employees to believe that the employer favors the union, has the Board, with Court approval, deemed employee free choice to be interfered with. *N.L.R.B.* v. *WKRG-TV, Inc.*, 470 F.2d 1302, 1313-1317 (C.A. 5, 1973); *N.L.R.B.* v. *Kane Bag Supply Co.*, 435 F.2d 1203, 1207 (C.A. 4, 1970); *N.L.R.B.* v. *Ozark Motor Lines*, 403 F.2d 356, 359 (C.A. 8, 1968); *N.L.R.B.* v. *Aero Corp.*, 363 F.2d 702, 707-708 (C.A.D.C., 1966), cert. denied, 385 U.S. 973 (1966).

The record reveals that Glevina participated only minimally at the meeting at which the employees signed authorization cards. Thus, Glevina was only one of numerous persons who spoke during the meeting and signed cards, and Glevina did not attempt to solicit cards or otherwise actively campaign for the Union during the meeting. This conduct does not rise to the level of participation necessary for a finding of improper solicitation that would invalidate the cards. *N.L.R.B.* v. *WKRG-TV, Inc.*, *supra*, 471 F.2d at 1316; *N.L.R.B.* v. *Kane Bag Supply Co.*, *supra*, 435 F.2d at 1207 ("While the supervisor twice signed cards for herself, attended some union meetings, asked one employee if he were going to a union meeting and transported

several other employees to union meetings, her participation in union activities was minimal"); *N.L.R.B. v. Aero Corp., supra*, 363 F.2d at 707-708 (two low-level supervisors handed out cards and evidence showed one participated in solicitation).

While Glevina has been found to be a supervisor by the Regional Director, the employees (including Warren) apparently did not consider Glevina to be a supervisor at the time they signed the authorization cards (A. 43; 95-99). In fact, the Union contested Glevina's supervisory status at the Board representation hearing (A. 43; 94). Therefore, even if Glevina's efforts on behalf of the Union had been greater, the employees (including Warren) "could not have reasonably believed that they would have incurred the ill-will of management by repudiating the Union." *N.L.R.B. v. Ozark Motor Lines, supra*, 403 F.2d at 359. Further, even if the employees were aware of Glevina's supervisory status, in these circumstances, where the Company's opposition to the Union was well-known (Brown's remarks to the mounting department employees and Scali and Weeks' warning to Ambrose), there is no basis for supposing that the employees were lead to believe on the basis of Glevina's activity that management favored the Union.

The Company next contends that the cards were obtained from the employees on the misrepresentation that they were not binding, and therefore the cards are not valid. The Board properly rejected this contention. Thus, it is well settled that where an employee has signed a union authorization card which on its face states unambiguously that the signer authorizes the union to represent his for collective bargaining purposes, the card is a valid designation unless the card's language was "deliberately and clearly cancelled by a union adherent

with words calculated to direct the signer to disregard and forget the language above his signature." *Gissel* at 606. Here the authorization cards are entitled "Application for Membership" and state in part that "I do irrevocably designate, authorize and empower this Local Union (923) exclusively . . . to represent and bind me in the presentation, prosecution, adjustment and settlement of my grievances, complaints or disputes . . . arising out of the employer-employee relationship . . ." (*supra*, p. 6). The record shows that Union representatives at the meeting on May 7 told the employees that the card was an authorization of the Union to represent them for purposes of collective bargaining and that the Union would seek recognition on the basis of the cards. Union representatives told the employees that the card was not binding only insofar as membership dues were concerned until the Union was recognized by the Company. Clearly, as the Board found, the remarks of Union representatives to the employees at the meeting did not serve to negate the clear meaning of the cards or lead the employees to believe that the cards were not binding.

Finally, the Board properly rejected the Company's contention that employee Vargas did not understand the language of the card. For while the card is in English and Vargas primarily spoke Spanish, the evidence shows that Vargas did speak some English (A. 45; 417) Moreover, Roberto Martinez, Radmaes Martinez and Carlos Bergin translated for Vargas at the May 7 meeting when Vargas signed his card (A. 45; Tr. 135). For the Board not to count the card of employee Vargas to whom the purpose of the card was explained "would have the effect of inhibiting organizational efforts among workers who are perhaps most in need of collective economic strength."

A.J. Krajewski Mfg. Co. v. *N.L.R.B.*, 413 F.2d 673, 677 (C.A. 1, 1969), cert. denied, 400 U.S. 957. Accord: *N.L.R.B.* v. *Gordon Mfg. Co.*, 395 F.2d 668, 669 (C.A. 6, 1968). In these circumstances, we submit that the Board properly counted Vargas card in determining whether the Union obtained a valid card majority among the unit employees.

B. The Company's other contentions are without merit

While the Union produced 10 authorization cards in the bargaining unit of 17 employees found appropriate by the Board on June 28, 1974, in the representation proceeding, the Union's initial demand for recognition on May 9 was made for a smaller unit that did not include drafting employees. However, the Union has never withdrawn its demand for recognition and, indeed, had actively supported the General Counsel's complaint seeking a bargaining order in the unit now found appropriate. The Board therefore found that the Union had adequately demonstrated its interest in obtaining recognition in the appropriate unit. The Company's contention that the Board's bargaining order is invalid because the complaint is at variance with the Board's findings is without merit. Thus, the complaint alleged that on May 7 a majority of employees in the appropriate unit had selected the Union as their bargaining representative. As the record evidence shows, the Union did in fact have cards on that date from a majority of employees in the unit found appropriate by the Board. While the complaint also alleged that the May 9 recognition demand was made in the unit found appropriate by the Board, whereas the demand was actually made for a smaller unit, this demand is not the basis for

the Board's unfair labor practice findings or its bargaining order. And, as we have shown, the Union has subsequently demonstrated its interest in obtaining recognition for the larger, appropriate unit. Such variance between the complaint and the findings cannot be characterized as "substantial" and would not defeat the Board's bargaining order if it were based on a finding that the Company had violated Section 8 (a)(5) of the Act. *Brewery & Beverage Drivers Local 67* v. *N.L.R.B.*, 257 F.2d 194, 196-197 (C.A.D.C., 1958). In the circumstances presented here the variance is not only insubstantial but it is irrelevant, for the Board's order is not grounded on a finding of a Section 8(a)(5) violation. Rather, the bargaining order is based on the premise that it is the only feasible, effective remedy for substantial unfair labor practices that had destroyed the conditions for a free and fair election. *Gissel, supra* at 614. Since the Board's order does not rest on a finding that the Company violated Section 8(a)(5) the variance between the unit originally requested and the one found appropriate by the Board does not affect the validity of the order. See *Steel-Fab Inc.*, 212 NLRB 169 (1974); *Walgreen Co.* v. *N.L.R.B.*, 509 F.2d 1014, 1017, n. 1 (C.A. 7, 1975).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Court should issue a decree enforcing the Board's order in full.

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 76-4050
	)	
AMERICAN MAP COMPANY, INC.,	)	
	)	
Respondent.	)	

CERTIFICATE OF SERVICE

The undersigned certifies that three (3) copies of the Board's offset printed brief in the above-captioned case have this day been served by first class mail upon the following counsel at the address listed below:

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/s/ Elliott Moore
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Deputy Associate General Counsel
NATIONAL LABOR RELATIONS BOARD

Dated at Washington, D. C.
this 10th day of May, 1976.